Supreme Court, U.S.
FILED
95-648 SEP 13 1995
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No. _____

In The

Supreme Court of the United States

October Term, 1995

WALTER S. KOLKER,

Petitioner,

versus

THE STATE OF FLORIDA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER THE PETITIONER HAS BEEN IMPROPERLY DENIED HIS RIGHT TO THE ASSISTANCE OF COUNSEL GUARANTEED TO HIM BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY THE OPINIONS OF THE FLORIDA COURTS?

2. WHETHER THE HEARING HELD IN STATE COURT AND THE ALLEGATIONS THERE PRESENTED CONSTITUTED A SUFFICIENT BASIS TO DISQUALIFY PETITIONER'S TRIAL COUNSEL AND DENY THE PETITIONER HIS COUNSEL OF CHOICE GUARANTEED BY THE SIXTH AMENDMENT?

3. WHETHER THE TRIAL COURT CONDUCTED AN ADEQUATE INQUIRY BEFORE DISQUALIFYING PETITIONER'S COUNSEL?

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CITATION TO OPINION BELOW

The trial court disqualified Petitioner's trial counsel on the authority of this Court's opinion in *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). (A. 16). The District Court of Appeal, Third District, in an opinion affirming the trial court (A. 1) denied the Petitioner's Petition for Writ of Certiorari to Review the trial court's order. The Florida Supreme Court affirmed the opinions of the trial and district court by declining to accept jurisdiction (A. 12) when Petitioner sought review in that court.

JURISDICTION

On June 15, 1995, the Supreme Court of Florida declined to accept jurisdiction in this case. (A. 12).

Petitioner invokes this Honorable Court's jurisdiction pursuant to Title 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOKED

This case involves Petitioner's federal constitutional rights under the Sixth Amendment to the United States Constitution, which reads, in pertinent part, as follows:

AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner, Edward Kruger and Ronald Williams were charged by information with multiple fraud and racketeering counts relating to their operation of Onyx Financial Group. Attorney Richard Marx has previously represented petitioner and Kruger, and had been counsel of record for Onyx. Williams was the president of Onyx. The state filed a motion to disqualify Marx from representing Kolker. (A. 20). Petitioner filed a memorandum in opposition of the state's motion. (A. 25). The Petitioner executed a waiver of conflict of interest in order to retain Marx. (A. 31). Kruger, who by this time had become a state witness, executed an affidavit (A. 14-15) in which he stated that he "had numerous private conversations with" (Marx) and considered "these conversations to be protected by the attorney/client privilege." (A. 14-15).

A hearing (A. 34-50) was held on the state's motion. At that hearing, petitioner requested an evidentiary hearing as to the vague, general allegations of Kruger's affidavit. (A. 41, 43). The trial court denied that request.

The trial court granted the state's motion. (A. 16). The petitioner sought certiorari review in the District Court of Appeal, Third District, which denied his petition. (A. 1). The petitioner moved both for rehearing (A. 6) and to certify the question to the Florida Supreme Court (A. 10), which motions were denied.

The petitioner sought review in the Supreme Court of Florida. Said review was denied. (A. 12).

The federal questions sought to be reviewed were raised in the trial court. (A. 20, 25, 36), the trial court's ruling (A. 16), the opinion of the District Court of Appeal. (A. 1). Petitioner's motion for rehearing (A. 6) in the District Court, and Petitioner's Brief on Jurisdiction in the Supreme Court of Florida. (A. 51).

The trial court ruled that this Court's decision in *Wheat v. United States, supra,* allowed it to remove Petitioner's counsel. (A. 16).

The District Court of Appeal upheld the trial court's exercise of its discretion under *Wheat, supra.* (A. 1).

The Supreme Court of Florida declined to accept jurisdiction. (A. 12).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

THE OPINIONS OF THE FLORIDA COURTS HAVE SERVED TO DENY PETITIONER HIS SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL BY DISQUALIFYING HIS CHOSEN COUNSEL ON THE BASIS OF INSUFFICIENT ALLEGATIONS AND IN THE FACE OF AN INSUFFICIENT INQUIRY.

In the case of *United States v. Laura,* 607 F.2d 56 (3d Cir. 1979), the Court considered an issue of disqualification of counsel and stated:

> We would reject reality if we were to suggest that lawyers are a homogeneous group. Attorneys are not fungible, as are eggs, appeals

> and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues. These differences, all within the range of effective and competent advocacy, may be important in the development of a defense. It is generally the defendant's right to make a choice from the available counsel in the development of his defense. Given this reality, a defendant's decision to select a particular attorney becomes crucial to the type of defense he will make and thus falls within the ambit of the sixth amendment. (p. 56).

In *Fuller v. Diesslin,* 868 F.2d 604 (3d Cir. 1989), the Court discussed a defendant's choice of counsel and stated:

> We do not understand the language in *Wheat* to mean that the right to counsel of choice is important *only* insofar as it secures the right to effective assistance of counsel. Rather, it could be fairly interpreted to mean that, although the core value in the sixth amendment is effective assistance of counsel, the amendment also comprehends other related rights, such as the "right to select and be represented by one's preferred attorney." (p. 610).

In *Whitmore v. Avery,* 26 F.3d 1426 (8th Cir. 1994), the Court considered a Sixth Amendment question and stated:

> *Wheat* also reaffirmed that counsel's multiple representation does not always violate the Sixth Amendment and that courts "must recognize a presumption in favor of [the defendant's] counsel of choice." (p. 1430).

The courts have thus recognized both that the individual skills and abilities of each attorney are unique and that the Sixth Amendment guarantees to a criminal defendant the right to select and be represented by that unique and individual attorney.

In the instant case, the representation issue arose due to counsel's having previously represented both petitioner and one Edward Kruger. Kruger subsequently obtained other counsel and became a witness for the state. Petitioner executed a Waiver of Conflict of Interest form (A. 31) in which the petitioner waived any conflict that may have arisen from his counsel's prior representation of Kruger.

In the case of *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993), the Court considered the question of a criminal defendant's waiver of conflict in order to retain his attorney and stated:

> In such a case, waiver by the accused of the conflict can conceivably alleviate the constitutional defect, so long as the representation by counsel does not seriously compromise the integrity of the judicial process. (p. 934).

A defendant may waive a conflict that counsel may have if the waiver's in accord with constitutional standards. See, *United States v. Amini*, 149 F.R.D. 647 (D. Utah 1993). The petitioner submits that the waiver that he executed (A. 31) complies with constitutional standards and is a competent waiver of any conflict that his trial counsel may have. See, also, *United States v. Fulton*, 5 F.3d 605 (2d Cir. 1993); *Williams v. Meachum*, 948 F.2d 863 (2d Cir. 1991); *Henderson v. Smith*, 903 F.2d 534 (8th Cir.

1990). The transcript of the trial court proceedings indicates that petitioner's wavier was presented to the trial court (A. 42) and that petitioner offered himself to the trial court if that court wished testimony as to his waiver. (A. 48). Petitioner's waiver was thus valid and before the court.

The petitioner submits that the next question to be considered is whether the allegations of a potential conflict between petitioner's counsel and Kruger were a sufficient basis to disqualify petitioner's counsel. Petitioner submits that they were not.

Where the denial of the constitutional right to the effective assistance of counsel is asserted, its peculiar sacredness demands that the record be scrupulously reviewed. See, *Avery v. State of Alabama,* 308 U.S. 444, 60 S.Ct. 321 (1940). In determining whether a constitutional right has been impermissibly burdened, it is appropriate to consider the legitimacy of the challenged government practice. See, *Jenkins v. Anderson,* 100 S.Ct. 2124 (1980). Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the inquiry suffered from the constitutional violations and should not unnecessarily infringe on competing interests. See, *United States v. Morrison,* 101 S.Ct. 665 (1981).

In the instant case, the alleged conflict between Petitioner's counsel and Kruger is "potential conflict." (A. 4-5). This "potential conflict" arose from Kruger's affidavit in which he stated:

> 5. During the course of my representation by Mr. Marx, I had numerous private conversations

> with him. I consider these conversations to be protected by the attorney/client privilege. In the months preceding June, 1994, I became concerned that Mr. Marx was not representing my interest but the interest of Ron Williams. (A. 14).

At the hearing in the trial court, petitioner's counsel disputed Kruger's allegations:

> Kruger submits an affidavit and says there were private confidential communications. We would ask for an evidentiary hearing. We'd like to know what he's talking about. We'd like to know what it is. Where it happened. How it happened and who heard it. (A. 41).

and,

> But I want to make the following representation to this Court. I want this Court to be aware and I will swear to this under oath, that the chances of a private communication between defendant Kruger and myself are slim and none and I'm prepared to swear to that. I'm also prepared to examine Mr. Kruger as to time, place, date, substance of any meaningful and confidential facts or information imparted by him to me because I'm making the assertion to this Court just the same way they did that it just didn't happen, didn't exist. I know what my ethical requirements are. I'm not going to find myself in that position. If I thought I had a host of private and confidential information from Mr. Kruger, I'm telling the Court number one, I don't. I'm telling the Court number two, I will tell this Court in open court under oath that whatever I know I will not impart. I will not impart to Mr. Weiner or anyone else we bring in for the purpose of

cross-examination. We have two issues. (A. 43-44).

The disqualification in the instant case was, thus, based on the general and unspecific allegations in Kruger's affidavit (A. 14-15) which were specifically denied by petitioner's counsel. (A. 41, 43-44). The petitioner specifically submits that there was an insufficient factual basis to disqualify petitioner's counsel especially when counsel specifically denied those allegations and requested an evidentiary hearing. The arbitrary dismissal of a defendant's attorney of choice violates a defendant's right to counsel. See, *United States v. Laura*, 607 F.2d 56 (3d Cir. 1979). Petitioner's counsel should not have been disqualified upon the "bare-bones", general and non-specific allegations of Kruger's affidavit. (A. 14-15).

The sufficiency of the allegations/evidence to warrant counsel's disqualification must be considered in conjunction with the question as to whether the trial court conducted an adequate inquiry into whether counsel should have been disqualified. The petitioner specifically submits that the inquiry by the trial court in the instant case, the basis for counsel's disqualification, was constitutionally inadequate.

As stated above, the vague and general affidavit of Kruger (A. 14-15) was specifically refuted by petitioner's counsel. (A. 43). Petitioner's counsel requested an evidentiary hearing (A. 41) and proffered/submitted petitioner for examination by the court. (A. 48). The trial court declined to question petitioner or to hold an evidentiary hearing. In essence, petitioner's counsel was

disqualified solely on the basis of Kruger's non-specific allegations.

In the case of *United States v. Winkle*, 722 F.2d 605 (3d Cir. 1983), the Court considered the question of disqualification of counsel and stated:

> The district court should hold a hearing to determine whether the conflict of interests, which the record strongly suggests, actually existed and adversely affected counsel's performance at the time of trial. (pp. 611-612).

In *United States v. Washington*, 797 F.2d 1461 (9th Cir. 1986), conflicting affidavits were submitted on the issue of whether a criminal defendant's counsel should have been disqualified. The court stated:

> As Judge Orrick acknowledged, the affidavits are in conflict on that very question. That conflict cannot be resolved without the benefit of an evidentiary hearing and findings by a trier of fact. (p. 1466).

In the case of *United States v. Fulton*, 5 F.3d 605 (2d Cir. 1993), the Court considered the question of disqualification of counsel upon an allegation of conflict and stated:

> Of course, the foregoing considerations do not apply if the allegations are clearly false. Thus, if a district court holds a full hearing and can definitively rule out the possibility that the allegations are true, a meaningful waiver is possible since the falsely accused attorney is conflicted only to the extent that she cannot cross-examine the witness regarding the false allegations. Such a conflict is a discreet one that closely resembles the conflict in *Iorizzo*. In such

> a situation, unlike that presented here, a district court following the procedures set forth in *United States v. Curcio*, 680 F.2d 881, 888-890 (2d Cir. 1982), may obtain a valid waiver. (p. 614).

In *United States v. Levy*, 25 F.3d 146 (2d Cir. 1994), the Court considered a court's duty to inquire and stated:

> When a district court is sufficiently apprised of even the possibility of a conflict of interest, the court first has an "inquiry" obligation. (citations omitted). The court must investigate the facts and details of the attorney's interests to determine whether the attorney in fact suffered from an actual conflict, a potential conflict, or no genuine conflict at all. (p. 153).

and,

> If the court discovers that the attorney suffers from a lesser or only a potential conflict – such that a rational defendant could knowingly and intelligently desire the conflicted lawyer's representation – the court should follow the procedures set out in *Curcio*, 680 F.2d at 888-890, in order to obtain directly from the defendant a valid waiver of his right to a non-conflicted lawyer, *see United States v. Iorizzo*, 786 F.2d 52, 58-59 (2d Cir. 1986). (p. 153).

Petitioner's counsel was found only to have a "potential conflict". (A. 4-5). Petitioner offered to be questioned regarding a waiver of this potential conflict. (A. 48). The trial court's failure to inquire, which inquiry would have ascertained petitioner's valid waiver of this potential conflict, was in direct contradiction to the procedure outlined in *United States v. Levy, supra,* and served to deny this petitioner his Sixth Amendment right to

counsel. See, also, *United States v. Amini*, 149 F.R.D. 647 (D. Utah 1993); *United States v. Valdez*, 149 F.R.D. 223 (D. Utah 1993).

The trial court's failure to conduct an adequate inquiry prevented a disclosure as to the extent of counsel's prior representation of Kruger. It was obviously in the pre-trial stages. If counsel's representation of Kruger were limited, counsel's representation may not have been a basis for disqualification. See, *United States v. Pirolli*, 742 F.2d 1382 (11th Cir. 1984); *United States v. Cunningham*, 672 F.2d 1064 (2d Cir. 1982). The petitioner specifically submits that the trial court's failure to inquire as to the extent of counsel's representation of Kruger, especially in view of counsel's assertion (A. 43) denied petitioner his Sixth Amendment right to the counsel of his choice.

The petitioner submits that this Honorable Court should grant certiorari to determine whether the allegations presented by the prosecution in the trial court, notably bare allegations such as that of Kruger (A. 14-15), present a sufficient basis to deny a criminal defendant his Sixth Amendment right to the counsel of his choice.

The petitioner additionally submits that this Honorable Court should grant certiorari to determine whether a trial court hearing which refused counsel's request for an evidentiary hearing (A. 43) and disregarded petitioner's offer to testify (A. 48), as to his waiver, was an adequate inquiry before it denied this criminal defendant his Sixth Amendment right to counsel of his choice.

CONCLUSION

For the foregoing reasons, this Honorable Court should grant certiorari, reverse the rulings of the trial court and District Court of Appeal and allow petitioner to retain his chosen counsel for the trial of this cause.

Respectfully submitted,

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No. _____

In The

Supreme Court of the United States

October Term, 1995

WALTER S. KOLKER,

Petitioner,

-versus-

STATE OF FLORIDA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Florida

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1994

WALTER S. KOLKER,	**	
Petitioner,	**	
vs.	**	CASE NO. 94-1899
THE STATE OF FLORIDA,	**	
Respondent.	**	

Opinion filed December 21, 1994.

On Petition for Writ of Certiorari from the Circuit Court for Dade County, Amy Steel Donner, Judge.

Richard E. Marx, for petitioner.

Robert A. Butterworth, Attorney General, and Richard L. Polin, Assistant Attorney General, for respondent.

Before SCHWARTZ, C.J., HUBBART, and JORGENSON, JJ.

JORGENSON, Judge.

Defendant Walter Kolker seeks certiorari review of an order granting the State's motion to disqualify attorney Richard Marx from representing him in a criminal proceeding. We deny the petition for certiorari.[1]

Walter Kolker, Edward Kruger, and Ronald Williams were charged by information with multiple fraud and racketeering counts relating to their operation of Onyx Financial Group. Attorney Richard Marx had previously represented Kolker and Kruger, and had been counsel of record for Onyx. Williams was the president of Onyx. Significantly, Marx maintained his law office within Onyx premises. The State filed a motion to disqualify Marx from representing Kolker. Kolker executed a Waiver of Conflict of Interest, seeking to maintain Marx' representation. Kruger, however, who had become a witness for the State, executed an affidavit in which he averred that he would not waive his attorney/client privilege relative to Marx, and that in the course of that relationship he had engaged in numerous private conversations with Marx which he believed were privileged. Kruger further averred that he discovered that Marx had failed to communicate a plea offer from the State until after the offer had expired. The trial court granted the State's motion. In a four-page order that contained specific findings of fact, the trial court concluded that, in light of Marx' past

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[1] Certiorari is the appropriate means by which to seek review of an order disqualifying a defendant's attorney. *See, e.g., Freeman v. State*, 503 So. 2d 997 (Fla. 3d DCA 1987).

representation of both Kolker and Kruger, "Mr. Marx will be placed in a position of adducing probative evidence or advancing plausible arguments on behalf of his client, Walter Kolker and his past client, Edward Kruger." This divided loyalty presented "serious potential for the conflict of interest," that overrode defendant Kolker's waiver of conflict.

The trial court acted within its broad discretion in disqualifying Marx. Although a criminal defendant has a presumptive right under the Sixth Amendment to the United States Constitution to counsel of his own choosing, "that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Wheat v. United States*, 486 U.S. 153, 164, 108 S. Ct. 1692, 1700, 100 L. Ed. 2d 140, ___ (1988).[2] In applying *Wheat* to a case similar to this one, the Eleventh Circuit held that "[t]he need for fair, efficient, and orderly administration of justice overcomes the right to counsel of choice where an attorney has an actual conflict of interest, such as when he has previously represented a person who will be called as a witness against a current client at a criminal trial." *United States v. Ross*, 33 F.3d 1507, 1523 (11th Cir. 1994). An attorney's previous relationship with a client who has become a witness for the government and plans to testify against the attorney's current client presents a dilemma of divided loyalty. It

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[2] For an overview of the issue, see generally Bruce A. Green, *"Through a Glass Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 Colum. L. Rev. 1201 (1989); Michael E. Lubowitz, Note, *The Right to Counsel of Choice After Wheat v. United States: Whose Choice Is It?*, 39 Am. U. L. Rev. 437 (1990).

would be improper for the attorney to use privileged communications from the former client in cross-examination of that former client; the conflict could also "deter the defense attorney from intense probing of the witness on cross-examination to protect privileged communications with the former client." *Ross*, 33 F.3d at 1523. In determining whether such actual or potential conflict calls for disqualification, the test is "whether the subject matter of the first representation is substantially related to that of the second." *Id.* Marx represented Kolker and Kruger in their capacities as principals of Onyx and also represented the Onyx entity; the prosecution arose from Kolker and Kruger's business activities with Onyx. Clearly, the subject matter of Marx' representation of his former client is substantially related to his representation of his current client.

Even though this matter is in the pretrial stages and an actual conflict may yet not be apparent, the case is rife with the potential for such conflict. "In the murkier pretrial context when relationships between parties are seen through a glass, darkly," the court is accorded broad discretion in determining whether the *potential* for conflict exists. *Wheat*, 486 U.S. at 162.

The trial court's explicit finding of a potential conflict of interest supports Marx' disqualification, even in light of defendant Kolker's waiver of conflict. "Such a waiver, however, does not necessarily resolve the matter, for the trial court has an institutional interest in protecting the truth-seeking function of the proceedings over which it is presiding by considering whether the defendant has effective assistance of counsel, regardless of any proffered waiver." *United States v. Moscony*, 927 F.2d 742, 749

(3d Cir.), *cert. denied*, 501 U.S. 1211, 111 S. Ct. 2812, 115 L. Ed. 2d 984 (1991). Kolker's presumptive right to waive conflict and retain Marx as his attorney is thus overcome by the the [sic] court's interest in conducting a fair trial by ensuring that Marx' cross-examination of his past client Kruger does not compromise Kruger's privileged communications; and that Marx' present client Kolker is not compromised by his less-than-vigorous cross-examination of Kruger.[3]

In light of Marx' past representation of Kolker, Kruger, and Onyx, we cannot conclude that the trial court exceeded its substantial latitude in determining that the potential for conflict exists, that Kolker's waiver of conflict is not dispositive, and that Marx should therefore be disqualified from representing Kolker. Because petitioner has failed to demonstrate a departure from the essential requirements of the law, we deny certiorari.

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[3] Petitioner has argued that any actual or potential conflict could be avoided by having substitute counsel conduct the cross-examination of Marx' former client. We disagree. The conflict arises from the past relationship, and cannot be avoided by sectioning off portions of the trial. Such an unwieldy procedure could only further cloud the glass. The potential for conflict would remain, as would the appearance of impropriety. "[C]ourts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat*, 486 U.S. at 160.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 94-1899

WALTER S. KOLKER,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

_____/

MOTION FOR REHEARING/MOTION FOR REHEARING EN BANC

COMES NOW, the Petitioner, through undersigned counsel, pursuant to Rule 9.330 and 9.331, Florida Rules of Appellate Procedure, and moves this Court to grant a rehearing/rehearing en banc in this cause. He would call this honorable Court's attention to the following facts or points of law which this honorable Court may have overlooked or misapprehended in reaching its opinion of December 21, 1994. He would state:

1. In the case of *Wheat v. United States*, 486 U.S. 153, 164, 108 S.Ct. 1692, 1700, 100 L.Ed.2d 140 (1988), the Court confronted the issue of joint representation of co-defendants, not the more limited question of in what circumstances the past representation of a former co-defendant may disqualify an attorney from representing a defendant in a pending criminal case.

2. The opinion of this Court in the instant case is submittedly in conflict with the opinion of this Court in

Freeman v. State, 503 So. 2d 997 (Fla. 3d DCA 1987) wherein, on substantially similar facts, this Court found:

> that the trial court erred in ordering the disqualification of Freeman's counsel of choice without first providing him with an opportunity to make an informed waiver of his right to conflict-free representation. Therefore, we reverse the trial court's order and remand for a rehearing in order to give Freeman the opportunity, after being fully apprised of the existence of any conflicts and of the resulting limitations upon his attorney to waive any claims which might arise from the existence of such conflicts and thereby retain his present counsel. Furthermore, if Freeman chooses to continue with his present attorney, "the trial judge will, in his conduct of the trial, exert every reasonable effort to prevent inadvertent disclosures of confidential information." (p. 998).

In the instant case, the Petitioner *waived* any attorney conflict (See, Appendix, p. 8).

In accordance with this Court's opinion in *Freeman*, the Petitioner should be allowed to retain his attorney. See, also, *DeArce v. State*, 405 So. 2d 283 (Fla. 1st DCA 1981).

3. In its opinion, this Court relied upon the decision of *United States v. Moscovy*, 927 F.2d 742 (3d Cir. 1991) (p. 5 of opinion). In *Moscovy, before* disqualifying counsel, the trial court held a hearing as to the testimony of the former clients/state witnesses. (p. 747). The transcript of the hearing in this cause reveals that Petitioner asked for an evidentiary hearing. (pp. 10-11, p. 13).

4. It must be noted that Petitioner argued below (p. 13 hearing transcript) and before this Court (p. 5 of opinion) that the problem could be resolved by having substitute counsel examine the former client. Relying upon *Wheat,* this Court disagreed. As *Wheat* concerned a situation of *ongoing* joint representation the potential of unknown future circumstances as well as known past facts clouded the picture. In the instant case, the representation of the former client, Kruger, is a past fact. Those areas of potential "inadvertent disclosure of confidential information" are readily discernible through an evidentiary hearing as to the types of communication between counsel and Kruger. Care can then be taken by the trial court so that substitute counsel does not question Kruger as to those facts determined by the trial court to be protected by the attorney/client privilege existing between Kruger and his previous counsel. Kruger can be protected. Petitioner can be afforded this Sixth Amendment right to the counsel of his choice.

WHEREFORE, based upon the foregoing facts, arguments and authorities, the Petitioner prays that this Rehearing or Rehearing En Banc be granted and its opinion of December 21, 1994 withdrawn.

I express a belief, based upon a reasoned and professional judgment both that the panel decision is of exceptional importance and that the panel decision is contrary

to the following decisions of this Court and that a consideration by the full Court is necessary to maintain uniformity of decisions in this Court: *Freeman v. State*, 503 So. 2d 997 (Fla. 3d DCA 1987).

/s/ John Lipinski

Respectfully submitted,

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BY: /s/ John H. Lipinski
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FLORIDA BAR NO.
151805

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Criminal Division, Post Office Box 013241, Miami, Florida 33101, this 5 day of January, 1995.

/s/ John Lipinski

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 94-1899

WALTER S. KOLKER,
Appellant,

vs.

THE STATE OF FLORIDA,
Appellee.
_____/

MOTION TO CERTIFY QUESTION

COMES NOW, the Petitioner, pursuant to Rule 9.030, Florida Rules of Appellate Procedure, and moves this Court to certify to the Florida Supreme Court the following questions:

> WHETHER AN ATTORNEY REPRESENTING A DEFENDANT IN A PENDING CRIMINAL CASE MUST BE DISQUALIFIED BECAUSE OF HIS PAST REPRESENTATION OF A CO-DEFENDANT WHEN HIS PRESENT CLIENT HAS EXECUTED A WAIVER OF ATTORNEY CONFLICT, SEPARATE COUNSEL WOULD CROSS-EXAMINE THE FORMER CLIENT AND THE ATTORNEY HAS NOT BEEN AFFORDED A HEARING AS TO THE FORMER CLIENT'S ASSERTION OF CONFIDENTIAL COMMUNICATIONS?

The Petitioner submits that the resolution of this question is both of great public importance and would have a great effect on the proper administration of justice.

The Petitioner would also request this honorable Court to certify this question to the Florida Supreme

Court to resolve the conflict which he submits exists between this honorable Court's decision in this cause and the District Court opinions in *DeArce v. State*, 405 So. 2d 283 (Fla. 1st DCA 1981) and *Freeman v. State*, 503 So. 2d 997 (Fla. 3d DCA 1987) on the same question of law.

WHEREFORE, the Petitioner requests this Court to certify the above question to the Florida Supreme Court.

Respectfully submitted,

LAW OFFICE OF
JOHN H. LIPINSKI, ESQ.
1455 N.W. 14th Street
Miami, Florida 33125
(305) 324-6376

RICHARD B. MARX, ESQ.
7900 Red Road
Suite 9
South Miami, Florida 33143-5545

BY: /s/ John Lipinski
JOHN H. LIPINSKI
FLORIDA BAR NO.
151805

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Criminal Division, Post Office Box 013241, Miami, Florida 33101, this 5 day of January, 1995.

/s/ John Lipinski

SUPREME COURT OF FLORIDA

THURSDAY, JUNE 15, 1995

WALTER S. KOLKER,	*	CASE NO. 85,372
Petitioner,	*	**DISTRICT COURT OF APPEAL, 3RD DISTRICT**
v.	*	NO. 94-1899
STATE OF FLORIDA,	*	
Respondent.	*	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Betsy Hill
Deputy Clerk

[SEAL]

BH

cc: Hon. Louis J. Spallone, Clerk
Hon. Harvey Ruvin, Clerk,
Hon. Amy Steel Donner, Judge

Mr. John H. Lipinski
Mr. Richard L. Polin

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

STATE OF FLORIDA, CRIMINAL DIVISION

Plaintiff, CASE NO.: F93-38848
Judge Donner

vs.

EDWARD KRUGER. **AFFIDAVIT OF EDWARD KRUGER**

Defendant.

Before me, the undersigned authority, personally appeared Ed Kruger, who after first being duly sworn, deposes and states as follows:

1. My name is Edward Kruger and I am a defendant in this case.

2. I was arrested in this case in November, 1993.

3. At the time of my arrest, I was told by Ron Williams to use Richard Marx as my attorney. I was told that I did not have to pay Mr. Marx and that Onyx Financial Group, Inc. or Ron Williams would pay my attorney's fees.

4. I have not paid Mr. Marx any money so if he has been paid, it was by Ron Williams.

5. During the course of my representation by Mr. Marx, I had numerous private conversations with him. I consider these conversations to be protected by the attorney/client privilege. In the months preceding June 1994. I became concerned that Mr. Marx was not representing my interest but the interest of Ron Williams.

6. In early June, 1994, I learned that the State had made a plea offer to me, however, I did not learn of the plea offer from Mr. Marx until after the date that the offer had expired.

7. I have not and will not waive my attorney/client privilege whether that privilege is potential or actual.

8. I have learned that Mr. Marx has subpoenaed my wife to testify, I will not and do not waive my spousal privilege and hereby assert that privilege.

FURTHER AFFIANT SAYETH NAUGHT

_____

EDWARD KRUGER

STATE OF FLORIDA)
COUNTY OF DADE)

Sworn to and subscribed before me by Edward Kruger, who states that he has read the foregoing document and the same is true, this ___ day of ___, 1994.

_____

NOTARY PUBLIC

(Seal)

IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL
CIRCUIT, IN AND FOR
DADE COUNTY, FLORIDA

CASE NO. F93-38848

STATE OF FLORIDA,

Plaintiff

vs.

RONALD G. WILLIAMS,
WALTER S. KOLKER,
EDWARD KRUGER.

Defendants

OPINION OF THE COURT

ORDER GRANTING PLAINTIFF'S MOTION FOR SUGGESTION OF ATTORNEY CONFLICT

THIS CAUSE having come before the Court on Plaintiff's Motion for Suggestion of Attorney Conflict, and the court having considered argument of counsel, and being otherwise fully advised in the premises, hereby makes the following findings of fact and conclusions of law.

Intercontinental Financial Group, which became Interco Funding Group, then Onyx Financial Group (IFG), is made up of four principle [sic] people responsible for the company's representations and its operations. The three defendants, Ronald G. Williams, Walter S. Kolker, and Edward Kruger are IFG's principal and/or corporate officers.

In mid 1989, IFG clients began filing complaints with the office of the comptroller, State of Florida, about

advance fees they had paid to IFG based on promised financing to be arranged by IFG. The complaints allege that the clients were promised refunds upon failure by IFG to obtain financing, however no refunds ever came through. Based on these complaints an investigation began of IFG.

Subsequently, The State of Florida has alleged that Ronald Williams, Walter Kolker, and Edward Kruger violated the laws of Florida, to wit: Racketeering, Conspiracy to Commit Racketeering, Committing Fraudulent Transactions, Organized Fraud, Communications Fraud, Issuing Worthless Checks, and violation of the Loan Broker's Statute.

Richard Marx represented defendants Edward Kruger and Walter Kolker. Also, Mr. Marx is or has been attorney of record and has litigated on behalf of IFG. Furthermore, Mr. Marx maintains his office within IFG's premises, in close proximity to all three co-defendants. Defendant Edward Kruger has become a witness for the State and will testify against his co-defendants, Ronald Williams and Walter Kolker. Even though Mr. Marx has withdrawn himself from his representation of Edward Kruger, Edward Kruger has submitted an affidavit to the court which states that during the course of Mr. Marx's representation, he "had numerous private conversations with him" and "considers these conversations to be protected by the attorney/client privilege". Because of these conversations Mr. Marx will not be able to cross-examine Ed Kruger when he testifies at trial. The State argues that this will result in an inability by Mr. Marx to zealously represent Walter Kolker.

It is a well established fact that district courts have a duty to take measures as are appropriate to protect criminal defendants against counsel's conflict of interests. *Wheat v. U.S.*, 486 U.S. 153 (1988). Additionally, it is crucial that they do so at the pretrial stage where relationships between parties are unclear and the dimensions of serious potential conflicts may be difficult to predict. *Id.* at 153. It is also important to note that the provision of waivers by all affected parties will not necessarily cure any problems, because "the courts have an independent interest in assuring compliance with ethical standards and the appearance of fairness". *Id.* at 153.

Mr. Marx will be placed in a position of adducing probative evidence or advancing plausible arguments on behalf of his client, Walter Kolker and his past client, Edward Kruger. Additionally, even Mr. Marx's representation of only Walter Kolker may impair the State's ability to communicate plea offers, because of Mr. Marx's association with the third co-defendant, Ronald Williams.

The defense argues that there is a presumption in favor of a defendant's counsel of choice. But this may be overcome not only by actual conflict of interest, but by a showing of "serious potential for conflict of interest. *Id.* at 165. The *Wheat* Court clearly permits this court to remove Mr. Marx as counsel in these proceedings. The Court stresses that the essential aim of the Sixth Amendment is to guarantee an effective advocate for for [sic] each criminal defendant and not that the defendant will be represented by the lawyer he/she prefers. *Id.* at 160.

The case before this court clearly indicates actual and serious potential for conflict of interest inherent in the

facts of this case. Furthermore, "[W]here a court justifiably finds an actual conflict of interest, there may be no doubt that it may decline a proffer of waiver . . . ". *Id.* at 160. In conclusion, this court, guided by the United States Supreme Court in *Wheat,* must request Mr. Marx to remove himself from this case because of a clear and actual conflict if interest due to the divided loyalties between the co-defendants, all of whom are principals of IFG.

Based upon the above, it is accordingly

ORDERED AND ADJUDGED that Plaintiff's Motion for Suggestion of Attorney Conflict be and the same is hereby GRANTED.

DONE AND ORDERED at Miami, Dade County, Florida, this the 28th day of July, 1994.

/s/ Amy Steele Donner
AMY STEELE DONNER
CIRCUIT COURT JUDGE

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

STATE OF FLORIDA,	:	CASE NO. F93-38848ABC
Plaintiff,	:	JUDGE: DONNER
vs.	:	SWP CASE NO. 91-162SFB
RONALD WILLIAMS, WALTER KOLKER, ED KRUGER,	:	
Defendants.	:	

MOTION FOR SUGGESTION OF ATTORNEY CONFLICT

COMES NOW the State of Florida, by and through the undersigned Assistant Statewide Prosecutor, and files this Motion Suggesting Attorney Conflict in the above styled case based on the following:

1. That Richard Marx currently represents co-defendants, Edward Kruger and Walter Kolker.

2. That either currently or in the past, Mr. Marx is or has been attorney of record and has litigated on behalf of Onyx Corporation.

3. That Onyx Corporation, also known as Interco Funding Group, Inc., and Intercontinental Financial Group, Inc., is the vehicle used by the defendants in committing and engaging in the criminal activity with which they are charged.

4. That the former president of Onyx, Ronald Williams, is the third co-defendant in the case.

5. That Mr. Marx maintains an office within Onyx, in close proximity to all three co-defendants.

6. That Mr. Marx cannot zealously and vigorously represent the co-defendants against each other, and his prior representation of Onyx on behalf of all three defendants creates a situation of divided loyalties.

7. That Mr. Marx has an ethical duty to "zealously assert the client's position under the rules of the adversary system." Rules Regulating The Florida Bar, ch. 4, Preamble.

8. Joint representation of defendants does not automatically amount to a conflict of interest. *Holloway v. Arkansas*, 435 U.S. 475 at 482 (1978). However, where co-defendants' interests are in conflict the joint representation of co-defendants by a single attorney may deprive a co-defendant of his Sixth Amendment right to effective assistance of counsel. *U.S. v. Medel*, 592 F2d 1305 at 1309 (5th circ. 1979), reh'g en banc denied 596 F2d 772 (1979).

10. When an attorney represents two defendants, and one co-defendant seeks to absolve himself by implicating the other, this amounts to a violation of the Sixth Amendment right to conflict free counsel. *White v. U.S.*, 396 F2d 822 (5th Circ. 1968). More generally, any instance where the testimony of one co-defendant inculpates the other co-defendant a conflict of interest will be found. *Id.* at 823-24.

11. The presumption in favor of a defendant's counsel of choice may be overcome not only by demonstrating actual conflict, but by showing a serious potential for a

conflict of interest. *Wheat v. U.S.*, 486 U.S. 153 at 165 (1988).

12. Even after a waiver of the right to conflict free counsel, the court's failure to separate representation of co-defendants may amount to a reversible issue. *Holloway v. Arkansas*, 435 U.S. 475 at 489 (1978); *Foster v. State*, 387 So. 2d 344 at 345 (Fla. 1980), cert. denied 464 U.S. 1052 (1980).

13. In response to this type of situation, the court in *Wheat* clearly and specifically endorsed the trial court's right and duty to reject a waiver of a defendant's right to the assistance of conflict free counsel. *Id.* at 160-2.

14. As the case law indicates a conflict of interest is inherent in the facts of this case, and under *Wheat* this court has the right and duty to remove Mr. Marx for either an actual conflict of interest or the serious possibility of having a conflict of interest arise in the course of these proceedings.

15. It is reasonable to assume that Mr. Kruger and Mr. Kolker will each testify in his own interest, each potentially incriminating the other and each giving different accounts of the facts. It is also a possibility that they, separately or together, may testify against Mr. Marx's former client, Mr. Williams.

16. Through his conversations with his two current clients and in light of his current or former capacity as attorney of record for Onyx Corporation, Mr. Marx probably already has information that each defendant could use in testimony to inculpate the other. This would force

Mr. Marx to make a Hobson's choice of deciding whose testimony to use.

17. It is clear that Mr. Marx is likely to be placed in a position of adducing probative evidence or advancing plausible arguments on behalf of each client that damages the other client's case. As noted above, this is deemed to amount to a conflict of interest. See e.g. *Barclay v. Wainwright*, 444 So. 2d 956 at 958 (Fla. 1984).

18. Likewise Mr. Marx will be restricted in any cross examination of his clients, which will be to both clients' detriment.

19. Mr. Marx will also be prevented from arguing the relative involvement or culpability of his two clients in order to minimize the culpability of one by emphasizing that of another. Under these conditions he will be incapable of properly representing each of his two clients.

20. Furthermore it is impossible for the State to communicate plea offers or other issues to these defendants while they are both represented by Mr. Marx. In fact, Mr. Marx' representation of even a single one of the defendants may impair the State's ability to make such communications because of Mr. Marx's association with the third co-defendant, Mr. Williams.

21. Finally, as noted in the case law above, permitting Mr. Marx to continue his representation of both or either defendant when there is such a blatant conflict of interest creates an issue for collateral attack.

Wherefore, based on the foregoing reasons and case law, the State respectfully requests that this Court remove

Mr. Marx from this case and as defense counsel for co-defendants Kruger and Kolker.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice has been provided by U.S. Mail this 23 day of May 1994 to: Jeffrey S. Weiner, Esquire, Two Catran Center, Suite #1910, 9130 South Dadeland Boulevard, Miami, FL 33156-7858; and to Richard Marx, Esquire, 7900 Red Road, Suite #9, South Miami, FL 33140.

/s/ Beth Blechman
BETH BLECHMAN
Assistant Statewide Prosecutor
4000 Hollywood Blvd., #505-S
Hollywood, FL 33021
(305) 985-4400
FLA BAR NO. 0599522

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

RONALD WILLIAMS, WALTER KOLKER, ED KRUGER,

Defendants.

CASE. NO.
F93-38848ABC

JUDGE: DONNER

SWP CASE NO.
91-162SFB

MEMORANDUM OF LAW IN OPPOSITION TO STATE'S MOTION FOR SUGGESTION OF ATTORNEY CONFLICT AND SUPPLEMENT TO MOTION FOR SUGGESTION OF ATTORNEY CONFLICT

The Defendant, WALTER KOLKER, by and through his undersigned attorney, files this Memorandum of Law in Opposition to State's Motion for Suggestion of Attorney Conflict and Supplement to Motion for Suggestion of Attorney Conflict and states as follows:

1. On May 23, 1994, the State filed a Motion for Suggestion of Attorney Conflict.

2. At the time of the aforementioned Motion, the undersigned attorney was representing Defendants KOLKER and KRUGER.

3. Subsequently, the State enlisted KRUGER as a witness in its case against KOLKER and WILLIAMS.

4. KRUGER has retained new counsel and the undersigned attorney has filed his Motion to Withdraw from representation of KRUGER.

5. On July 12, 1994, the State filed a Supplement to Motion for Suggestion of Attorney Conflict.

6. The essence of the State's argument in its Motion for Suggestion of Attorney Conflict is that the undersigned attorney's joint representation of co-defendants KRUGER and KOLKER deprives them of their Sixth Amendment right to conflict-free counsel. That issue has become moot as a result of the undersigned attorney's Motion to Withdraw from representation of KRUGER.

7. In its Supplement to Motion for Suggestion of Attorney Conflict, the State raises the following new argument: "3. That there have been confidential and privileged communications between Edward Kruger and Mr. Marx. 4. That because of said privileged communications Mr. Marx would not be able to cross examine Edward Kruger when he testifies at trial in the above-styled case. 5. That Mr. Marx will not be able to zealously represent Walter Kolker because of his inability to cross examine Edward Kruger. 6. That Mr. Marx is in an impossible situation because he is faced with a Hobsen's choice in his continued representation of Walter Kolker versus his cross examination of Edward Kruger."

8. In the leading case of *United States v. Garcia*, 517 F.2d 272, 277 (5th Cir. 1975), the court held that "defendants may waive the right to conflict-free assistance of counsel." In the recent case of *United States v. Rodriguez*, 982 F.2d 474 (11th Cir. 1993), the court affirmed the convictions of co-defendants who argued on appeal that their

joint representation had deprived them of their Sixth Amendment right to conflict-free counsel. Citing *Garcia* in support of its decision, the *Rodriguez* court held that "[a] defendant may waive this right [to conflict-free counsel] by choosing to proceed to trial with an attorney who has an adverse interest."

9. In *Freeman v. State*, 503 So. 2d 997 (Fla. 3d DCA 1987), on facts substantially similar to those of the instant case, the Third District reversed the lower court's disqualification of counsel on conflict of interest grounds. In *Freeman*, as in the instant case, the State had enlisted as a witness a co-defendant who had been previously represented on a related matter by the disqualified attorney. Furthermore, in *Freeman*, unlike the instant case, the former client joined in the State's motion for disqualification, asserting that the attorney's continued representation of the defendant would violate the former client's attorney-client privilege.

Citing *DeArce v. State*, 405 So. 2d 283, 284 (Fla. 1st DCA 1981) and *United States v. Armedo-Sarmiento*, 524 F.2d 591, 592 (2nd Cir. 1975), the *Freeman* court held that "[i]n a criminal case, the existence of a conflict of interest is not determinative because the defendant has a constitutionally guaranteed right to counsel of his choice. . . . [W]e find that the trial court erred in ordering the disqualification of [the defendant's] counsel of choice without first providing him with an opportunity to make an informed waiver of his right to conflict-free representation." *Freeman*, at 998.

WHEREFORE, the Defendant requests this Court to deny the State's Motion for Suggestion of Attorney Conflict.

/s/ Richard B. Marx
Richard B. Marx, Esquire
Attorney for Defendant
7900 Red Road, Suite 9
South Miami, FL 33143
(305) 669-0696
Florida Bar No. 51075

I HEREBY CERTIFY that a copy of this Memorandum was mailed and faxed to Beth Blechman, Esq., Assistant Statewide Prosecutor, 4000 Hollywood Blvd., #505-S, Hollywood, FL 33021, this 26 day of July, 1994.

/s/ Richard B. Marx
Richard B. Marx, Esquire
Attorney for Defendant
7900 Red Road, Suite 9
South Miami, FL 33143
(305) 669-0696
Florida Bar No. 51075

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

STATE OF FLORIDA, Plaintiff, vs. RONALD WILLIAMS, WALTER KOLKER, ED KRUGER, Defendants.	:	CASE. NO. F93-38848ABC JUDGE: DONNER SWP CASE NO. 91-162SFB

SUPPLEMENT TO MOTION
FOR SUGGESTION OF ATTORNEY CONFLICT

COMES NOW the State of Florida, by and through the undersigned Assistant Statewide Prosecutor, and files this Supplement to Motion Suggesting Attorney Conflict due to recent developments in the above-styled case as follows:

1. That pending before this Court is Mr. Marx's Motion to Withdraw from his representation of Edward Kruger.

2. That Mr. Kruger has become a witness for the State and will testify against his co-defendants, Ronald Williams and Walter Kolker.

3. That there have been confidential and privileged communications between Edward Kruger and Mr. Marx.

4. That because of said privileged communications Mr. Marx would not be able to cross examine Edward Kruger when he testifies at trial in the above-styled case.

5. That Mr. Marx will not be able to zealously represent Walter Kolker because of his inability to cross examine Edward Kruger.

6. That Mr. Marx is in an impossible situation because he is faced with a Hobsen's choice in his continued representation of Walter Kolker versus his cross examination of Edward Kruger.

WHEREFORE, in conjunction with grounds stated in the Motion for Suggestion of Attorney Conflict, the State requests Mr. Marx remove himself from this case because of a clear and actual conflict of interest due to the divided loyalties to Ronald Williams, Walter Kolker and Edward Kruger.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice has been provided by facsimile and U.S. Mail this 12 day of July 1994 to: Richard Marx, Esquire, 7900 Red Road, Suite #9, South Miami, FL 33143 and Jeffrey S. Weiner, Esquire, Two Datran Center, Suite #1910, 9130 South Dadeland Boulevard, Miami, FL 33156-7858.

/s/ Beth Blechman
BETH BLECHMAN
Assistant Statewide Prosecutor
4000 Hollywood Blvd., #505-S
Hollywood, FL 33021
(305) 985-4400
FLA BAR NO. 0599522

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

STATE OF FLORIDA	CRIMINAL DIVISION
Plaintiff,	CASE NO. F-93-38848 ABC
v.	JUDGE: AMY STEELE DONNER
WALTER KOLKER	
Defendant.	

WAIVER OF CONFLICT OF INTEREST FORM

The United States Constitution gives every defendant the right to effective assistance of counsel. When one lawyer represents two or more defendants in a case, the lawyer may have trouble representing all of the defendants with the same fairness. This is a conflict of interest that denies the defendant the right to effective assistance of counsel. Such conflicts are always a potential problem because different defendants may have different degrees of involvement. Each defendant has the right to a lawyer who represents him/her and only him/her.

This kind of conflict of interest can be dangerous to a defendant in a number of ways. A few examples are:

The government may offer to recommend a lesser sentence to one defendant if he cooperates with the government. His/her lawyer ought to advise him/her on whether or not to accept this offer. But if the lawyer advises him/her to accept the offer, it may harm the cases of the other defendants, who are also his clients.

The government may let a defendant who is not as involved as other defendants plead guilty to lesser charges than the other defendants. After the guilty plea, however, the government may require the defendant to testify. The lawyer who represents more than one defendant might recommend that the first defendant not plead guilty to protect the other defendants that he represents; or the lawyer might recommend that the first defendant plead guilty, which might harm the cases of the other defendants.

Sometimes one of the defendants represented by a lawyer will take the stand to testify in his own behalf. In order to represent the other defendants fairly the lawyer should question the defendant on the stand as completely as possible. However, he may not be able to do that because he cannot ask the defendant as a witness about anything that defendant has told him in confidence.

The best defense for a single defendant often is the argument that while the other defendants may be guilty, he is not. A lawyer representing two or more defendants cannot effectively make such an argument.

Evidence that helps one defendant might harm another defendant's case. When one lawyer represents two or more defendants, he might offer or object to evidence that could help one defendant if it harms the other defendant's case.

The Court advises defendants against representation by a lawyer who also represents other defendants in the same case. The Court urges each defendant to obtain a lawyer who will represent him/her and only him/her.

Each defendant has the right to a lawyer of his/her own. Each defendant can also give up that right, if he chooses.

I have read the above statement, and I understand it fully. I know I have a right to an attorney of my own, but I want to give up this right.

Want **RICHARD B. MARX, ESQUIRE** as my lawyer, even though he represents one or more other defendants in this case and he might have a conflict which would not be in my best interest.

Date: July 26, 1994 /s/ Walter Kolker
Walter Kolker

Signed and Acknowledged before me in Miami, Florida this ___ day of ___, 1994.

AMY STEELE DONNER
CIRCUIT COURT JUDGE

94-131697-D

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO.: 93-38848 ABC

THE STATE OF FLORIDA,

Plaintiff,

vs.

RONALD GLENN WILLIAMS,
WALTER KOLKER, AND
EDWARD KRUGER,

Defendants.
_____/

Excerpt transcript of the proceedings held before the Honorable Alan L. Postman, at the Richard E. Gerstein Building, 1351 Northwest 12th Street, Miami, Florida, on July 27, 1994, at approximately 9:30 p.m.

APPEARANCES:

BETH BLECHMAN, ESQUIRE
Special Prosecutor
On behalf of the State

RICHARD MARX, ESQUIRE
Miami, Florida
On behalf of the defendant,
Walter Kolker.

RONALD C. DRESNICK, ESQUIRE
4770 Biscayne Blvd.
Miami, Florida
On behalf of the defendant,
Edward Kruger.

[p. 3] * * *

THE COURT: May I please have argument on the motion.

MS. B LECHMAN: On the State's motion for suggestion of attorney conflict, I'm providing the Court with a packet of case law which goes along with my original motion. Things have changed. I provided to Mr. Marx copies of all that case law. I would also at this time – Mr. Marx has provided an affidavit of Edward Kruger – I'd like to take a moment. I think the facts need to be explained here.

There's been a motion filed. There was a subsequent motion filed because the facts have changed. When we started out I had suggested that there was one conflict of interest because you have Mr. Marx representing Mr. Kruger and Mr. Kolker. You have Mr. Weiner representing Mr. Williams, but Mr. Marx had ties to Mr. Williams prior to this case even being filed because Mr. Marx was counselor under the ex-corporation, Onyx, which is one of the vehicles that is in this information used to commit the criminal activities. Mr. Marx has offices at Onyx Corporation. Mr. Marx is paid by Onyx Corporation.

The conflict that is suggested initially with regards to the original relationship is that Mr. Marx has divided loyalties between representing Kolker and Kruger on one hand versus Williams on the other hand. Who does his loyalties go to?

[p. 4] In the affidavit that I provided in light of what has happened recently, Mr. Kruger is no longer represented by Mr. Marx. Mr. Kruger is now a State witness.

THE COURT: Is anybody representing him?

MS. BLECHMAN: Mr. Dresnick has stepped in as attorney of record. Mr. Dresnick provided me with that affidavit by Mr. Kruger. One of the other facts are with regards to legal fees that were being paid to represent Kolker and Kruger that also was being paid by Onyx. I suggest there is a question as to who Mr. Marx is loyal to.

The second conflict that has arisen even now with Mr. Kruger's actions is that Mr. Marx is in a position where he is going to have to – in order to provide effective assistance of counsel to Mr. Kolker – is going do have to cross examine Mr. Kruger, which he can't do ethically. He is a former client and there was privileged information. It doesn't matter what information there was, but it was privileged to him the communications.

Those, I suggest, are the two conflicts. The main case that I'm relying on, Your Honor, and all those cases again, they kind of go into the first motion, Wheat, a United States Supreme Court case, 1988, and counsel's cases – he provided me with for his argument at four o'clock yesterday afternoon – counsel's cases and many of the cases on the area –

[p. 5] THE COURT: What is the case.

MS. BLECHMAN: Wheat, 108 Supreme Court Reporter 1692. What defense counsel says is he's going to use Freeman, Garcia and Rodriguez that a defendant can waive his right to conflict of counsel. And while the cases stand for that proposition, what Wheat stands for is that the Court does not have to accept that waiver. There are several reasons why the Court should not in every case

accept a waiver. First and foremost, Florida case law, Barkley versus Waynewright (phonetic), Florida Supreme Court case, 1984, it's in the packet, and Foster versus State, a Florida supreme court case, 1980, stands proposition where you have an actual conflict of interest. We have an actual conflict of interest. We have two of them. It's reversible error.

I'm urging to protect the Court and to protect the record, in this case it's going to be reversible error. It doesn't matter if Mr. Kolker jumps up and down and waives from here to the appellate courts. The appellate court stated in Wheat and time and time again revisited the issue of ineffective assistance of counsel and they have struck down time and time again what seemingly appeared to be valid waivers. What Wheat says is that in evaluating whether or not there is a conflict – well, what Wheat says is that the Court can reject a waiver even if there's a serious potential for conflict. I think we go beyond that [p. 6] in this case and that the focus should be in the adversary process not on the accused relationship with the attorney. The aim is to effective advocacy. Rather than the defendant be represented by the attorney of his choice, a defendant, this is a again cited from Wheat, may not insist on counsel who has a previous ongoing relationship with an opposing party. While there is a presumption in favor of counsel of choice, it can be overcome by a conflict.

Again, your Honor, I need to ask the Court to recognize two separates conflict issues here. What a lot of these cases deal with is joint representation. And while we do have a conflict with regards to joint representation because of Mr. Marx's relationship with Ron Williams

and his representation of Walter Kolker, the other conflict is his prior representation of Edward Kruger and Edward Kruger's testimony against Mr. Kolker and Mr. Marx is forced to cross-examine Mr. Kruger.

What the cases address time and time again is just one issue or the other and not both and I would ask the Court to distinguish in evaluating these cases between those that speak of joint representation and those that speak of cross-examination.

In defense counsel's cases that he's going to be talking about the issue in the main case Garcia – first of all, Wheat supersedes Garcia. Garcia is a 1975 Fifth [p. 7] Circuit Federal case. Wheat is a 1988. Case and Garcia talks about it can be waived. The Garcia case talks about it can be waived. Yes, I admit everything can be waived, but what Wheat says is you don't have to accept a waiver.

Your Honor, I'm going to stop arguing at this point and give defense counsel a turn to argue and I'd like to come back with some comments.

THE COURT: Let me tell you the problem I have.

MR. MARX: Judge, I won't be long.

THE COURT: Go ahead. I'm going to tell you right now it doesn't matter whether you will be long or not be long. We will take a recess in four minutes and come back to court at quarter to two.

You have four minutes. Then we are coming back at quarter to two.

MR. MARX: I will wait.

THE COURT: See you then.

(Thereupon, the Court took a recess, after which the following proceedings were had:)

THE COURT: Let's go back up on this motion. I believe it was Mr. Marx's time to speak. I believe Ms. Blechman has reserved and would like to have rebuttal. That is what we are doing.

MR. MARX: May it please the Court, I'd like to hand a memorandum of law we hand delivered to the Court, which we [p. 8] supplied to Ms. Blechman by fax and by mail yesterday.

Your Honor, there are two issues before the Court concerning the issue of conflict. There are two parts that the Court must consider.

The first is the conflict based on joint representation and the second issue is the issue of confidential communications. The State has made it very clear in their argument to the Court that they were relying specifically on the supreme court case of Wheat versus United States. If that is their position, they must loose as a matter of law because Wheat is clearly distinguishable from any issue that is before the Court. The reason for that is, Judge, as follows; the Wheat opinion states as follows and these are the salient words in the circumstances of this case with the motion for substitution of counsel made so close to the time of trial the district court relied on instinct and judgment based on experience in making their decision. In that decision they disqualified – actually they didn't even disqualify. Wheat is so completely out of context as

is every single case cited by the State. Every case cited by the State I can distinguish as a matter of law.

In Wheat the salient decision of the provision are as follows: number one, Wheat, the petitioner in that case saw it to create a conflict of law by hiring the same lawyer [p. 9] who represented two other defendants. So the reason that Wheat doesn't apply is it has nothing to do with the facts of this case.

In this case I only represent one party. Mr. Kruger has his own independent counsel. And I moved to extricate myself from that situation by filing my motion to withdraw and, in fact, having it granted by the Court.

Now, that is not the Wheat decision. In Wheat two days before trial they came into a federal court and by their maneuver or attempted maneuver what they would have accomplished, they would have aborted the trial. I think you know how the federal court treats continuances. It would have mandated a continuance. So the district court judge was faced with this situation if I grant the petitioner's request to allow the same lawyer to operate in this case, I will have to give a continuance and I ain't going to do it and Wheat is confined to those facts. Those are not the facts of the instant case. Wheat does not apply.

Now, Your Honor, the case law – the well-established law in both the United States and the State of Florida specifically speaks to the issue of conflict. And the leading case I have cited in the memorandum is United States versus Garcia. It is the touchstone of multiple representation. In Garcia – which [p. 10] is alive and well in the 11th Circuit Court of Appeals which covers this state – the

Court specifically set out a formula for the trial court to follow in multiple defendant representation and what they said in Garcia was as follows, the Court is obligated to conduct a rule 11 type inquiry. The same inquiry that you conducted this morning in a plea offer in a case while I was sitting here. You went through a plea colloquy. Well, the federal rules require the federal judge to do that and Garcia says and it is followed today. Today it is followed in this circuit. There is a procedure and the procedure is to make sure that the defendant makes a knowing and intelligent and an informed judgment concerning conflict.

And let me say this to you, the State fails as a matter of law and their moving paper – they haven't produced evidence. All we have heard is argument of counsel on the conflict. Now, it seems to me – it seems to me that the law requires more than just a general allegation and assertion of conflict because if that stuck – if that proposition stuck all the State would have to do is make a bold acquisition and allegation then there would never be multiple representation. All they would have to do is say we believe there is a conflict.

Kruger submits an affidavit and says there were private confidential communications. We would ask for an [p. 11] evidentiary hearing. We'd like to know what he's talking about. We'd like to know what it is. Where it happened. How it happened and who heard it.

Let me tell you this. Kruger entered into a plea agreement, which the State has failed as of this moment to give us. As of this moment the State has failed to give us a copy of the plea agreement.

I submit to the Court there is as much as possibility contained in that plea agreement that is proffered by Kruger to the State, and waivers of privilege by publications that exist. I don't know what he's stated to the State. They are mandated under the discovery rules to give us that, but they come into court without it. They come into court without it. They come into court with a bold allegation that there is conflict and that is all they have presented to the Court.

Now, the State of Florida, the law in the State of Florida is Freeman versus State. Freeman versus State, which is in the Third DCA alive and well and Shepherdized and up to date. That law is clear in a criminal case the existence of a conflict – conflict of interest is not determined because the defendant has a constitutional guaranteed right to counsel of his choice. That is the law in the State of Florida today. That has not been changed. The opinion further goes on and listen to this, this [p. 12] applies to all cases cited by the State, the Darcy (phonetic) case and a couple of others. What happened in the State's case that they cite to the Court was that there was never an intelligent and knowing waiver. The Court failed to follow the Garcia ruling. The teachings of Garcia were not followed in those cases and they were supportive of the proposition that a conflict exists only because – and only because they failed to ask the defendant and to know that the defendant knowingly and intelligently and voluntarily waived the conflict.

I have and I'm submitting to the Court a waiver – a waiver by Mr. Kolker of the possibility of a possible conflict not only because of the fact that I represented Mr. Kruger, but he also waives and acknowledges and you

can examine him under oath, acknowledges that there may have been the possibility of confidential communications, and despite that fact, he wants me and he will get up here under oath and he will testify.

I'd like to submit that affidavit to the Court because this is the exact document that is used in the federal courts in the 11th Circuit today. It is the waiver that I have used in other federal cases right on point. I will give the State a copy and ask the clerk to hand you the original waiver.

I would also tell the Court that there is a case [p. 13] subsequent to Wheat – there is a case subsequent to Wheat which is very instructional. And in that case – that case is cited United States versus Melo, M-E-L-O. And in this case, which just happened to involve Jeff Weiner, the Court acknowledged the potential of conflict and then rules as follows and they acknowledge the Wheat decision. But in Melo, they said that the trial court – the trial court must seek other avenues other than disqualification, if available.

And in this case assuming, but not agreeing that there might have been private communications, we can solve that. Mr. Weiner can do the cross-examination and another attorney can do the cross-examination. But I want to make the following representation to this Court. I want this Court to be aware and I will swear to this under oath, that the chances of a private communication between defendant Kruger and myself are slim and none and I'm prepared to swear to that. I'm also prepared to examine Mr. Kruger as to time, place, date, substance of any

meaningful and confidential facts or information imparted by him to me because I'm making the assertion to this Court just the same way they did that it didn't happen, didn't exist. I know what my ethical requirements are. I'm not going to find myself in that position. If I thought I had a host of private and confidential information from Mr. Kruger, I'm [p. 14] telling the Court number one, I don't. I'm telling the Court number two, I will tell this Court in open court under oath that whatever I know I will not impart. I will not impart to Mr. Weiner or anyone else we bring in for the purpose of cross-examination. We have two issues.

I would also like you to understand this, Judge, that in Wheat – in Wheat the reason for the conflict was that the same lawyer was going to represent a government witness at the same time he was representing the petitioner in that case. In this case I'm only representing one individual unless they can establish conflict – substantial conflict unless they can establish private communications of any substantive nature.

I would also tell the Court Kruger did not join in the motion. he did not join in this motion. This is the State's motion. As a matter of law, without him being a party to the motion, I would think it fails. So based upon our memorandum of law, which is the law, the defendant Kolker has the right to knowingly and intelligently waive any potential conflict. It's almost as simple as that. The State has failed other than a bold, naked allegation concerning conflict to establish anything.

The cases – and I think it's the Rodriguez case, cited in my brief, in my memorandum says it can't be speculative. It can't be speculative. There has to be [p. 15] more than just the naked statement of the attorney representing the government that there is a conflict. They must demonstrate the conflict. And even then – even then that can be and must be waived by somebody who goes through a rule 11, Garcia – In fact, in the federal courts they call it a Garcia hearing. It's alive. It's well. It's used today. They absolutely call it a Garcia.

THE COURT: You are repeating yourself, Mr. Marx.

MR. MARX: I have nothing further, Judge.

MS. BLECHMAN: Your Honor, comments on defense counsel's argument with respect to the cases, I disagree one hundred percent on his interpretation of not only the facts, but the law as well. And for example, he cites facts when it's convenient and he cites the law when it's convenient.

Wheat is very, very applicable with this situation specially the law the supreme court used which came out and they use. One of the things Wheat addresses is the probable conflict. All you can do is come forward and make allegations and advise the Court the best that you can that you believe a conflict exists. I would ask the Court to consider in conjunction with the law the affidavit filed by Mr. Dresnick on behalf of Mr. Kruger and the facts that are put forth to the Court in there. There is an actual conflict, not a potential conflict, but an actual conflict [p. 16] established in that affidavit by the facts in there including Mr. relationship not only with Mr.

Kruger, but with Mr. Williams and the Onyz Corporation. Wheat should not be confined to the facts alone, but the law to the proposition and it's words on the 6th amendment right to counsel. What Mr. Marx says is that one has a 6th amendment right to counsel of ones choice, that is correct, but that right is not absolute. That is what these cases stand for.

The leading law is Barkley versus Winlow (phonetic) 1984 Florida supreme court case. I have supplied it to the Court in that packet. I would suggest that, and not Freeman, a Third DCA case, stands for the law in conflicts in the State of Florida. The two issues I do not see necessarily as joint representation and confidential communication, the two conflict issues we have here is the joint representation which still exists because of Mr. Marx's relationship with Mr. Williams and with regards to the other issue the possible cross-examination. There is a case that Mr. Marx cites in his brief DeArce, D-E-A-R-C-E, a First DCA case. It's older case, a 1981 case, but that talks about waivers and what it says not only if a defendant is going to waive a conflict must he give a knowing and intelligent, et cetera, type waiver, but he has to know what he's waiving. It's not only a matter [p. 17] of waiving a conflict, Your Honor, it's a matter of waiving a right to confrontation. I suggest Mr. Kruger is not going to be cross-examined in this case by Mr. Marx because of Mr. Marx's relationship with Mr. Williams nor by Mr. Weiner. That is not to going to cure any cross-examination problems here. I think the proper remedy in this situation because of Mr. Marx's relationship with all three of these defendants in different variations is that he needs to be removed from the case for the integrity of this process to

continue and so that Mr. Kolker could have his day in court and be able to confront the people against him and so that Mr. Kruger is able to testify.

The other problem that we have here is, as I suggested prior, is divided loyalties. There was a plea that was communicated to Mr. Kruger after its expiration date so, yes. I do make the allegations and yes, I do question the loyalties of Mr. Marx in this case. And Mr. Kolker needs to be fully advised of all of this and I still, based on Wheat, Your Honor, the appellate court can revisit this issue. This is reversible error should there be found ineffective assistance of counsel on Mr. Kolker's behalf should be appeal. And I suggest, this is the time to stop any improper procedures that are going to be occurring in this trial.

MR. MARX: Your Honor –

[p. 18] THE COURT: Its not a back and forth, back and forth. I'm sorry. I'm going to ask Mr. Dresnick if he has anything to say.

MR. DRESNICK: I'm sitting here biting my lip. I sympathize with Mr. Marx in his position. I have been in his position somebody has moved to disqualify me because of a conflict. I think an attorney takes a risk any time he represents more than one client because you never know when a plea offer is going to be made to one of them and then you find yourself in this position.

On behalf of Mr. Kruger, it's Mr. Kruger's position that he's had confidential communications with Mr. Marx. He asserting his privilege. I think the cases talk about the appearance of impropriety as opposed to what

is real. It's the appearance that the courts have been talking about with regards to appearance of impropriety. As far as Mr. Kruger is concerned if he's on the stand and if Mr. Marx – even if he's not cross examined – if Mr. Weiner is cross examining him, he's wondering what has Marx told Weiner. Mr. Marx says he won't say anything to Mr. Weiner. I accept his word that that would happen. I think the issue is the appearance of impropriety is what matters here. And so Mr. Kruger has submitted an affidavit and it's his position that there is a conflict.

THE COURT: All right. Thank you, sir.

[p. 19] I'm not going to make a ruling, but I will make a ruling on 7-29. I'm going to tell you why I'm going to do it then. I'm going to be away. If I rule that Mr. Marx is not going to be the attorney of record, then I want to allow the defendant to obtain new counsel and I need to set a trial date. So the trial is set for 8-29. And if I remove Mr. Marx, there is going to have to be some continuance. I doubt a new attorney will be able to take over in four weeks from a trial that is going to be as large as this one.

MR. MARX: Maybe I be heard, Judge. Would you want testimony on the record at this point from Mr. Kolker.

THE COURT: No, sir, because I think that is only one of the issues. It's not sufficient. It's a question of whether or not the Court finds that the law that has been presented to its mandates your removal as the attorney. And if it does, sir, I will do. So if it doesn't, I wouldn't. It's a very simple issue for the Court at this time.

MS. BLECHMAN: Your Honor, I'm not familiar with the Court's procedure. Are you going to issue a written ruling?

THE COURT: Yes, I am. I'm going to issue a written ruling. I'm going to verbally announce it on 7-29.

MS. BLECHMAN: Are we to appear before you?

THE COURT: You can if you like. I think you should. [p. 20] If I'm going to have to give a new trial date, you need to be here to talk to me.

MS. BLECHMAN: What time.

THE COURT: Regular time. What I do normally I do my arraignment calendar which is usually anywhere between four and ten pages. Then I ask private counsel or special prosecutors to come up and call a case.

MR. MARX: Judge, I will not be in town on the 29th.

THE COURT: Sir, you are not going to have any more argument.

MR. MARX: I'm just telling the Court.

THE COURT: I will anncunce it. If you are not going to be the attorney of record, I don't know whether or not Mr. Kolker is going to have to be appointed an attorney and that decision will be — I guess he will tell the Court whether or not he can afford the services of an attorney. And if he can't, I'm going to have to appoint the Public Defender.

MR. MARX: I want to Court to know if the ruling is adverse there will be an appeal.

THE COURT: Then that's what will happen.

MR. DRESNICK: We have an agreed motion for motion to travel.

THE COURT: No, I'm not inclined to sign it. I don't know who the attorney of record will be. Leave it with the [p. 21] clerk of the court, please.

Thank you.

(Thereupon, the proceedings were concluded.)

App. 51

IN THE SUPREME COURT OF FLORIDA

CASE NO.

DCA NO. 94-1899

WALTER S. KOLKER,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

PETITIONER'S BRIEF ON JURISDICTION

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INTRODUCTION

The petition, Walter S. Koler, was the petitioner in the District Court and the defendant in the trial court. The respondent was the respondent in the District Court and Piaintiff in the trial court. The parties will be referred to as they stand before this Court. The symbol "A" will designate the appendix to this brief.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court, or another district court of appeal on the same point of law. Article I, section 3(b)(3), Florida Constitution; Rule 9.030(a)(2)(A)(iv), Florida Appellate Rules. Additionally, the petitioner suggests the decision directly affects the duties and powers of constitutional or state

officers. Article V, Section 3(b)(3), Florida Constitution; Rule 9.030(a)(A)(iv), Florida Appellate Rules.

STATEMENT OF THE CASE AND FACTS

Petitioner, Edward Kruger, and Ronald Williams were charged by information with multiple fraud and racketeering counts relating to their operation of Onyx Financial Group. Attorney Richard Marx had previously represented petitioner and Kruger, and had been counsel of record for Onyx. Williams was the president of Onyx. The state filed a motion to disqualify Marx from representing Kolker. (A. 1-7). Petitioner filed a memorandum in opposition to the state's motion. (A. 8-11). The petitioner executed a waiver of conflict of interest in order to retain Marx. (A. 12-13). Kruger, who by this time had become a state witness, executed an affidavit (A. 14-15) in which he stated that he "had numerous private conversations with" (Marx) and considered "these conversations to be protected by the attorney/client privilege." (A. 14-15).

A hearing (A. 16-36) was held on the state's motion. At that hearing, petitioner requested an evidentiary hearing as to the vague, general allegations of Kruger's affidavit. (A. 25-26, 28). The trial court denied that request.

The trial court granted the state's motion. (A. 37-40). The petitioner sought certiorari review in the District Court of Appeal, Third District, which denied his petition. (A. 41-45). The petitioner moved both for rehearing (A. 46) and to certify the question to this Court (A. 50), which motions were denied.

The petitioner now seeks review in this Court.

QUESTION PRESENTED

I. WHETHER THE OPINION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE OPINION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT IN THE CASE OF *DE ARCE v. STATE*, 405 So. 2d 183 (Fla. 1st DCA 1981), ON THE SAME POINT OF LAW?

II. WHETHER THE OPINION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE INSTANT CASE DIRECTLY AND EXPRESSLY AFFECTS AND REGULATES THE DUTIES AND POWERS OF CONSTITUTIONAL AND STATE OFFICERS?

SUMMARY OF ARGUMENT

The petitioner submits that the decision of the District Court of Appeal, Third District, in the instant case conflicts with *DeArce v. State, supra,* on the question as to when an attorney representing a defendant in a pending criminal case must be disqualified because of his past representation of a person who is now a state witness. Where, as in the instant case, the present client has executed a waiver of attorney conflict, separate counsel would cross-examine the former client, and the past client's assertion of confidential communications are, at best, vague, the petitioner submits that the attorney should not be disqualified and his present client denied counsel of his choice.

The petitioner submits that this question is of great public importance as it affects state and constitutional

officers such as state attorneys and their considerations in whether to seek to disqualify defense counsel and defense counsel in their considerations of whom they can represent and when such representation must cease.

ARGUMENT

I. THE OPINION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE OPINION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT IN THE CASE OF *DE ARCE v. STATE*, 405 So.2d 183 (Fla. 1st DCA 1981), ON THE SAME POINT OF LAW.

In the instant case, petitioner's attorney had represented a *former* co-defendant, now a state witness. Knowing this, petitioner executed a specific waiver in an effort to retain his counsel. To this day, it is not known what "privileged communications" the prior client, Mr. Kruger, had with petitioner's counsel. Mr. Kruger's affidavit (A. 14-15) speaks only of "numerous private conversations." Mr. Kruger did not state whether those conversations were in reference to the instant case or give any indication whatsoever (under seal or in camera) that the contents of those conversations had any material relevance to the pending case or Mr. Kruger's position/defense (something other than "when's the next court date?").

In its opinion, the District Court opined:

> Mr. Marx will be placed in a position of adducing probative evidence or advancing plausible arguments on behalf of his client, Walter Kolker and his past client, Edward Kruger. This divided

> loyalty presented "serious potential for the conflict of interest", that overrode defendant Kolker's waiver of conflict. (A. 42-43).

The District Court acknowledged that "this matter is in the pretrial stages and an actual conflict may yet not be apparent." (A. 44). The Court found that "Kolker's presumptive right to waive conflict and retain Marx as his attorney is thus overcome by the Court's interest in conducting a fair trial by ensuring that Marx' cross-examination of his past client Kruger does not comprise Kruger's privileged communications; and that Marx' present client Kolker is not compromised by his less-than-vigorous cross-examination of Kruger." (A. 45).

In the case of *DeArce v. State*, 405 So. 2d 283 (Fla. 1st DCA 1981), the Court also considered a situation in which an attorney's past clients, now cooperating with the state, objected to his representation of one of their former co-defendants. There the present defendant waived any conflicts due to his attorney's representation. The District Court held that if that petitioner elected to proceed with his present attorney,

> "[I]t is to be understood that the witnesses will be entitled to full protection in preserving the confidentiality of their privileged communications . . . and they may refrain from answering any questions from [defense counsel] which are based on privileged communications. Moreover, the trial judge will, in his conduct of the trial, exert every reasonable effort to prevent inadvertent disclosures of confidential information." *U.S. v. Armedo-Sarmiento* at 593. (p. 285).

The petitioner thus submits that pursuant to *DeArce v. State, supra,* the prevailing case law in Florida is that in situations such as the instant case, criminal defendants such as petitioner be allowed to retain their choice of counsel following a thorough waiver (as was executed), while prior client witnesses "may refrain from answering any questions from [defense counsel] which are based on privileged communication" and will be protected by the trial court's every reasonable effort to prevent inadvertent disclosures of confidential information (cross-examination by other counsel(?)). See, also, *Freeman v. State,* 503 So. 2d 997 (Fla. 3d DCA 1987).

The District Court of Appeal deviated from established law, petitioner submits, when it introduced a new standard of "broad discretion" (A. 43) in reviewing whether the trial court had erred in disqualifying attorney Marx. The Court in *DeArce v. State, supra,* did not approve of such a broad standard of review as it stated that:

> In a criminal case, the existence of a conflict of interest is not determinative because the defendant has a constitutionally guaranteed right to counsel of his choice. (p. 284).

Petitioner submits, therefore, that the instant District Court of appeal opinion is in direct conflict with *DeArce v. State, supra,* (1) as to the standard of review to be used by appellate courts in reviewing trial court rulings on motions to disqualify defense counsel when, as here, former co-defendants become state witnesses, and (2) as to the substantive ruling of *DeArce, supra,* which holds that in such cases, defense counsel, upon an appropriate waiver by their present client, not be disqualified.

The petitioner further submits that both the trial court and District Court utilized an incorrect evaluation of *Wheat v. United States*, 108 S.Ct. 1692 (1988) to reach their rulings/opinions in this case. In *Wheat, supra*, a defendant wished to hire an attorney utilized by his co-defendants, who were entering or contemplating guilty pleas which would render them government witnesses. The question in that case was whether an attorney could be retained, not his disqualification. That opinion addressed a situation of proposed representation where "a few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants" not a situation where representation ceased in pretrial stages (Kruger negotiated a guilty plea agreement with other counsel) and the assertions of conflict (See, Kruger's affidavit, A. 14-15) are exceedingly vague and nebulous. The Court in *Wheat* also relied upon the fact that "the motion for substitution of counsel (was) made so close to the time of trial" (p. 1699 of opinion).

The petitioner submits that any reliance upon *Wheat, supra*, is misplaced both because it is factually dissimilar to the instant case and because prevailing Florida law on the precise issue of the instant case requires that a criminal defendant in the State of Florida, enjoying his right to counsel under both the Florida Constitution and Federal Constitution, be afforded the retained counsel of his choice in the face of a prosecution effort to *disqualify counsel who had been representing him*. See, *DeArce v. State, supra*. See, also, *Freeman v. State*, 503 So. 2d 997 (Fla. 3d DCA 1987).

II. THE OPINION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IN THE INSTANT CASE DIRECTLY AND EXPRESSLY AFFECTS AND REGULATES THE DUTIES AND POWERS OF CONSTITUTIONAL AND STATE OFFICERS.

As the instant District Court opinion concerns the disqualification of already-retained and already-representing defense counsel, this opinion expressly affects and regulates the duties and powers of constitutional and state officers, namely prosecutors and defense attorneys. The instant decision directly bears upon the power and duty of a prosecutor to seek disqualification of retained counsel, who had been representing his client for some time. As criminal prosecutions are frequently made possible by former co-defendants who then become state witnesses (particularly in conspiracy or narcotics cases), the question of when a defense attorney may be disqualified by a prosecutor/state officer is of importance in every criminal court in the State of Florida. The question is also relative to the regulation of the trial calendars of criminal judges (a disqualification would require continuance(s) for the appearance of new counsel) and as such would affect the performance of those constitutional officers.

As the instant opinion of the District Court of Appeal has such far-reaching ramifications in the criminal justice system and does affect the above-named categories of constitutional officers, the petitioner submits that this Court should accept jurisdiction in this case. See, *Ludlow v. Brinker*, 403 So. 2d 969 (Fla. 1981); *School Board of Pinellas County v. District Court of Appeal*, 467 So. 2d 985 (Fla. 1985).

CONCLUSION

Petitioner respectfully requests this honorable Court to accept jurisdiction of this cause to consider the merits of his argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the office of the Attorney General, RICHARD L. POLIN, Assistant, Criminal Division, Post Office Box 013241, Miami, Florida 33101, this 24 day of March, 1995.

/s/ John Lipinski
JOHN H. LIPINSKI